

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

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MAY 16 2008

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2007-0357-PR
)	DEPARTMENT B
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
DOUGLAS DWAYNE GAINES,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200401001

Honorable Kevin D. White, Judge

REVIEW GRANTED; RELIEF DENIED

Douglas Dwayne Gaines

Douglas
In Propria Persona

E S P I N O S A, Judge.

¶1 A jury found appellant Douglas Dwayne Gaines guilty of aggravated assault, a class three felony and dangerous-nature offense. The trial court sentenced him to a presumptive, enhanced, 7.5-year prison term, and this court affirmed his conviction and

sentence on appeal. *State v. Gaines*, No. 2 CA-CR 2006-0230 (memorandum decision filed Mar. 20, 2007). Gaines has brought a previous post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P., in which he asserted trial counsel had been ineffective. The trial court denied relief, and we upheld its ruling on review. *State v. Gaines*, No. 2 CA-CR 2007-0258 (memorandum decision filed Feb. 7, 2008).

¶2 While Gaines's first petition for review was still pending in this court, Gaines filed a second petition for post-conviction relief in August 2007, alleging newly discovered evidence, prosecutorial misconduct at trial, and abuse of the trial court's discretion in allowing a person allegedly related to one of the state's witnesses to remain on the jury. The trial court summarily dismissed Gaines's petition, finding his first claim did not satisfy the requirements of Rule 32.1(e) for claims of newly discovered evidence and his prosecutorial misconduct claim and juror challenge were precluded under Rule 32.2(a) as issues either raised or raisable on appeal. In considering Gaines's petition for review of that ruling, we will not disturb the trial court's decision unless the court clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶3 As described in our memorandum decision on appeal, Gaines was convicted of stabbing a seventeen-year-old girl, apparently because she had decided to stop selling methamphetamine for him. Driving a white Monte Carlo that was familiar to the victim, Gaines had pulled up next to her as she was walking to a friend's house. Two female passengers in the Monte Carlo forced the victim into the car. There Gaines first threatened

then stabbed the victim in the abdomen before pushing her out of the moving vehicle in front of her friend's house.

¶4 The purportedly newly discovered evidence Gaines sought to present was an affidavit from Adam Ramirez, who stated he lived in the same neighborhood as the victim's friend and, in fact, referred to the friend's family as his "cousins." Ramirez's affidavit states:

This letter is about the day in question. I, Adam Ramirez live in the 300th block of South Drylake. On that day in question, I was outside of my house watering my lawn when I saw a light silver-bluish car stop at the corner of First Street and Drylake. I was wondering what was it doing there because that is where my cousins live, the Vasquez family.

Then all of a sudden, the car sped off. At that time, I heard someone screaming. I went inside to try to call my Mom so she could call my cousins but I got no answer. I stayed inside for about ten to twenty minutes. When I returned back outside the Police and Ambulance were already there. I later found out that someone had been stabbed.

The apparent point of the affidavit was that the "light silver-bluish car" the witness claimed to have seen was a different vehicle than Gaines's white Monte Carlo described by both the victim and her friend. Gaines also submitted his own affidavit avowing that he had "neither seen, nor been presented with any evidence . . . [or] any material fact" that refuted his assertions of newly discovered evidence and entitlement to an evidentiary hearing.

¶5 Rule 32.1(e) specifies the following criteria for asserting a colorable post-conviction claim of newly discovered material facts:

(1) The newly discovered material facts were discovered after the trial.

(2) The defendant exercised due diligence in securing the newly discovered material facts.

(3) The newly discovered material facts are not merely cumulative or used solely for impeachment, unless the impeachment evidence substantially undermines testimony which was of critical significance at trial such that the evidence probably would have changed the verdict or sentence.

¶6 The trial court determined, correctly, that Gaines’s newly discovered evidence claim “fails on its face.” As the court observed, Gaines offered no explanation “why the claim was not stated in the previous petition or in a timely manner” nor did he assert diligence in attempting to discover and offer Ramirez’s testimony sooner. More importantly, the court ruled, “the affidavits fail to substantiate Defendant’s claim that new evidence exists which would have changed the verdict.”

¶7 Presumably Gaines intended to use Ramirez’s testimony to impeach the victim’s identification of Gaines as her assailant. But, given the tangential nature of what Ramirez claimed to have seen, the victim’s considerable familiarity with Gaines and his vehicle, and her positive identification of Gaines as the person who had stabbed her, Ramirez’s statement that “a light silver-bluish car” stopped in front of his cousins’ home and then sped away at the same time he “heard someone screaming” appears highly unlikely to have affected the jury’s verdict. We therefore find no abuse of the trial court’s discretion in finding Gaines had failed to present a colorable claim of newly discovered evidence.

¶8 In the third, fourth, and fifth arguments of his petition for review, Gaines essentially repeats the claims presented in his petition for post-conviction relief below. The

first and second issues in the petition for review, however, were not raised below.¹ We do not consider for the first time on review issues on which the trial court has not had an opportunity to rule. *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (petitioner may not present new issues in petition for review). Therefore, we decline to address the first and second issues in the petition for review because Gaines had not first presented them to the trial court.

¶9 Although we grant the petition for review, we find no abuse of the trial court’s discretion and therefore deny relief.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge

¹In the first issue in his petition for review, Gaines argues the trial court should not have deemed his claims precluded because the claims are of “sufficient constitutional magnitude” that they required his knowing, personal waiver. *See Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002). Therefore, he contends, the trial court wrongly deemed his claims precluded. In the second issue, Gaines argues the claims he asserted below “were fundamental errors” that could not be waived and thus should not have been precluded. He contends he presented a sufficiently colorable claim to have been entitled to an evidentiary hearing before the trial court summarily dismissed his petition.